Supreme Court of the United States.

Nos. 32 and 87.—October Term, 1904.

32	W. O. Johnson, Petitioner, *vs.* Southern Pacific Company.	On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
87	W. O. Johnson, Plaintiff in Error, *vs.* Southern Pacific Company.	In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 19, 1904.]

Johnson brought this action in the District Court of the First Judicial District of Utah against the Southern Pacific Company to recover damages for injuries received while employed by that company as a brakeman. The case was removed to the Circuit Court of the United States for the District of Utah by defendant on the ground of diversity of citizenship.

The facts were briefly these: August 5, 1900, Johnson was acting as head brakeman on a freight train of the Southern Pacific Company, which was making its regular trip between San Francisco, California, and Ogden, Utah. On reaching the town of Promontory, Utah, Johnson was directed to uncouple the engine from the train and couple it to a dining car, belonging to the company, which was standing on a side track, for the purpose of turning the car around preparatory to its being picked up and put on the next west-bound passenger train. The engine and the dining car were equipped, respectively, with the Janney coupler and the Miller hook, so called, which would not couple together automatically by impact, and it was, therefore, necessary for Johnson, and he was ordered, to go between the engine and the dining car, to accomplish the coupling. In so doing Johnson's hand was caught between the engine bumper and the dining car bumper, and crushed, which necessitated amputation of the hand above the wrist.

On the trial of the case, defendant, after plaintiff had rested, moved the court to instruct the jury to find in its favor, which motion was granted, and the jury found a verdict accordingly, on which judgment was entered. Plaintiff carried the case to the Circuit Court of Appeals for the Eighth Circuit and the judgment was affirmed. 117 Fed. Rep. 462.

Mr. Chief Justice Fuller delivered the opinion of the Court:

This case was brought here on certiorari, and also on writ of error, and will be determined on the merits, without discussing the question of juris-

diction as between the one writ and the other. *Pullman Car Company* v. *Transportation Company*, 171 U. S. 138, 145.

The plaintiff claimed that he was relieved of assumption of risk under common law rules by the act of Congress of March 2, 1893, (27 Stat. 531, c. 196), entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes."

The issues involved questions deemed of such general importance that the Government was permitted to file brief and be heard at the bar.

The act of 1893 provided:

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. . . .

"SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred." . . .

"SEC. 8. That any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The Circuit Court of Appeals held, in substance, Sanborn, J., delivering the opinion and Lochren, J., concurring, that the locomotive and car were both equipped as required by the act, as the one had a power driving wheel brake and the other a coupler; that section 2 did not apply to locomotives; that at the time of the accident the dining car was not "used in moving interstate traffic;" and, moreover, that the locomotive, as well as the dining car, was furnished with an automatic coupler, so that each was equipped as the statute required if section 2 applied to both. Thayer, J., concurred in the judgment on the latter ground, but was of opinion that

locomotives were included by the words "any car" in the second section, and that the dining car was being "used in moving interstate traffic."

We are unable to accept these conclusions, notwithstanding the able opinion of the majority, as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction.

The intention of Congress, declared in the preamble and in sections one and two of the act, was "to promote the safety of employees and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes," those brakes to be accompanied with "appliances for operating the train-brake system;" and every car to be "equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," whereby the danger and risk consequent on the existing system was averted as far as possible.

The present case is that of an injured employee, and involves the application of the act in respect of automatic couplers, the preliminary question being whether locomotives are required to be equipped with such couplers. And it is not to be successfully denied that they are so required if the words "any car" of the second section were intended to embrace, and do embrace, locomotives. But it is said that this cannot be so because locomotives were elsewhere in terms required to be equipped with power driving-wheel brakes, and that the rule that the expression of one thing excludes another applies. That, however, is a question of intention, and as there was special reason for requiring locomotives to be equipped with power driving-wheel brakes, if it were also necessary that locomotives should be equipped with automatic couplers, and the word "car" would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed. Now it was as necessary for the safety of employees in coupling and uncoupling, that locomotives should be equipped with automatic couplers, as it was that freight and passenger and dining cars should be, perhaps more so, as Judge Thayer suggests, "since engines have occasion to make couplings more frequently."

And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject matter and object, "any car" meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act. *Winkler* v. *Philadelphia and Reading Railway Company*, 53 Atl. Rep. 70; 4 Penn. (Del.) 387; *Fleming* v. *Southern Railway Company*, 131 N. C. 476; *East St. Louis*

Connecting Railway Company v. *O'Hara*, 150 Ill. 580; *Kansas City &c. Railroad Company* v. *Crocker*, 95 Ala. 412; *Thomas* v. *Georgia Railroad and Banking Company*, 38 Ga. 222; *New York* v. *Third Ave. Ry. Co.*, 117 N. Y. 404; *Benson* v. *Railroad Company*, 75 Minn. 163.

The result is that if the locomotive in question was not equipped with automatic couplers, the company failed to comply with the provisions of the act. It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car, but that the couplers on each, which were of different types, would not couple with each other automatically by impact so as to render it unnecessary for men to go between the cars to couple and uncouple.

Nevertheless, the Circuit Court of Appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

If the language used were open to construction, we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow.

This strictness was thought to be required because the common law rule as to the assumption of risk was changed by the act, and because the act was penal.

The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law, and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. And, as Chief Justice Parker remarked, conceding that statutes in derogation of the common law are to be construed strictly, "they are also to be construed sensibly, and with a view to the object aimed at by the legislature." *Gibson* v. *Jenney*, 15 Mass. 205.

The primary object of the act was to promote the public welfare by securing the safety of employees and travellers, and it was in that aspect

remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. *Taylor* v. *United States*, 3 How. 197; *United States* v. *Stowell*, 133 U. S. 1, 12, and cases cited. And see *Farmers' National Bank* v. *Deering*, 91 U. S. 29, 35; *Gray* v. *Bennett*, 3 Met. (Mass.) 539.

Moreover it is settled that "though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States* v. *Lacher*, 134 U. S. 624. In that case we cited and quoted from *United States* v. *Winn*, 3 Sumn. 209, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

"I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature."

Tested by these principles, we think the view of the Circuit Court of Appeals, which limits the second section to merely providing automatic couplers, does not give due effect to the words "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars," and cannot be sustained.

We dismiss as without merit the suggestion, which has been made, that the words "without the necessity of men going between the ends of the cars," which are the test of compliance with section two, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling, and if read, as it should be, with a comma after the word "uncoupled," this becomes entirely clear. *Chicago, Milwaukee & St. Paul Railway Company* v. *Voelker*, 129 Fed. Rep. 522; *United States* v. *Lacher*, *supra*.

The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling

automatically. True, no particular design was required, but whatever the devices used they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found "in the language actually used, interpreted according to its fair and obvious meaning." *United States* v. *Harris*, 177 U. S. 309.

That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer. *Binns* v. *United States*, 194 U. S. 486, 495; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463.

President Harrison, in his annual messages of 1889, 1890, 1891 and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: "It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."

And he reiterated his recommendation in succeeding messages, saying in that for 1892: "Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employees killed and 26,140 injured. Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin."

The Senate report of the first session of the Fifty-second Congress, (No. 1049,) and the House report of the same session, (No. 1678,) set out the numerous and increasing casualties due to coupling, the demand for protection, and the necessity of automatic couplers, coupling interchangeably. The difficulties in the case were fully expounded and the result reached to require an automatic coupling by impact so as to render it unnecessary for men to go between the cars, while no particular device or type was adopted, the railroad companies being left free to work out the details for themselves, ample time being given for that purpose. The law gave five years, and that was enlarged, by the Interstate Commerce Commission as authorized by law, two years, and subsequently seven months, making seven years and seven months in all.

The diligence of counsel has called our attention to changes made in the bill in the course of its passage, and to the debates in the Senate on the report of its committee. (24 Cong. Rec., pt. 2, pp. 1246, 1273 *et seq.*) These demonstrate that the difficulty as to interchangeability was fully in

the mind of Congress and was assumed to be met by the language which was used. The essential degree of uniformity was secured by providing that the couplings must couple automatically by impact without the necessity of men going between the ends of the cars.

In the present case the couplings would not work together, Johnson was obliged to go between the cars, and the law was not complied with.

March 2, 1903, (32 Stat. 943, c. 976,) an act in amendment of the act of 1893 was approved, which provided, among other things, that the provisions and requirements of the former act "shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type;" and "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce."

This act was to take effect September first, nineteen hundred and three, and nothing in it was to be held or construed to relieve any common carrier "from any of the provisions, powers, duties, liabilities, or requirements" of the act of 1893, all of which should apply except as specifically amended.

As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act. *Bailey* v. *Clark*, 21 Wall. 284; *United States* v. *Freeman*, 3 How. 556; *Cope* v. *Cope*, 137 U. S. 682; *Wetmore* v. *Markoe*, *ante*, . This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived.

Another ground on which the decision of the Circuit Court of Appeals was rested remains to be noticed. That court held by a majority that as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory to be picked up by that train as it came along that evening.

The presumption is that it was stocked for the return, and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not "an empty," as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras in *Voelker* v. *Railway Company*, 116 Fed. Rep. 867, that "it cannot be true that on the east-

ern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty."

Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and *Coe* v. *Errol*, 116 U. S. 517, is cited as supporting that contention. In *Coe* v. *Errol* it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former State before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different States, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law.

Finally it is argued that Johnson was guilty of such contributory negligence as to defeat recovery, and that, therefore, the judgment should be affirmed. But the Circuit Court of Appeals did not consider this question, nor apparently did the Circuit Court, and we do not feel constrained to inquire whether it could have been open under § 8, or, if so, whether it should have been left to the jury under proper instructions.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with instructions to set aside the verdict and award a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.